Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1996

AMERITECH CORPORATION, AMERITECH SERVICES, INC., and MICHIGAN BELL TELEPHONE CO., Petitioners,

*v.*

GARY RACZAK, et al., Respondents

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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86 pp

## QUESTION PRESENTED

This petition presents a question essentially identical to the one that this Court has agreed to review in *Oubre* v. *Entergy Operations, Inc.*, No. 96-1292 (cert. granted Apr. 21, 1997):

Whether, under the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), a former employee who received additional consideration in return for releasing age discrimination claims against the employer may file an age discrimination claim and contest the validity of the release without first tendering back to the employer the consideration received.

## RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

The petitioners are Ameritech Corporation, Ameritech Services, Inc., and Michigan Bell Telephone Company. Ameritech Corporation has no parent. Its non-wholly owned subsidiaries are: Telecom Corporation of New Zealand Limited, Sky Network Television Limited (New Zealand), MATAV (Hungary), Ameritech New Zealand Funding Corporation, Quantum Control Systems, L.L.C., and Belgacom (Belgium). The parent of Ameritech Services, Inc. and Michigan Bell Telephone Company, neither of which has any non-wholly owned subsidiaries, is Ameritech Corporation.

The respondents are Gary Raczak, Bernard Surma, Loraine Holmes, Gladys Moore, Carole Chandler, Lou Ann Fox, M. Jean Kruse, Phyllis Tarpley, and Thomas Satkiewicz.

## TABLE OF CONTENTS

*Page*

QUESTION PRESENTED ..... i

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING ..... ii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTORY PROVISION INVOLVED ..... 1

STATEMENT ..... 1

REASONS FOR GRANTING THE PETITION ..... 6

I. IN RULING AGAINST A TENDER-BACK REQUIREMENT, THE SIXTH CIRCUIT JOINS THE THIRD, SEVENTH, AND ELEVENTH CIRCUITS IN A SHARP CONFLICT WITH DECISIONS OF THE FOURTH AND FIFTH CIRCUITS ..... 6

II. THE SIXTH CIRCUIT'S DECISION MISCONSTRUES THE MEANING OF OWBPA AND VIOLATES WELL-ESTABLISHED PRINCIPLES OF WAIVER AND TENDER BACK ..... 8

**TABLE OF CONTENTS - Continued**

*Page*

A. OWBPA Does Not Abrogate The Common Law Tender-Back Doctrine . . 8

B. The Sixth Circuit's Misconstruction Of OWBPA Seriously Harms Employers And Employees Alike . . . . . 11

III. AT A MINIMUM, THIS COURT SHOULD HOLD THE PETITION FOR DISPOSITION IN LIGHT OF ITS RULING IN *OUBRE* . . . . . 13

CONCLUSION . . . . . 14

## TABLE OF AUTHORITIES

*Cases:* *Page*

*Blakeney* v. *Lomas Information Sys., Inc.*, 65 F.3d 482 (5th Cir. 1995), cert. denied, 116 S. Ct. 1042 (1996) . . . . . 6, 13

*Blistein* v. *St. John's College*, 74 F.3d 1459 (4th Cir. 1996) . . . . . 6

*Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) . . . . . 10

*Cumberland & Ohio Co.* v. *First American Nat'l Bank*, 936 F.2d 846 (6th Cir. 1991) . . . . . 9

*Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812) . . . . . 9

*Forbus* v. *Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), cert. denied, 506 U.S. 955 (1992) . . . . . 7

*Hogue* v. *Southern Ry.*, 390 U.S. 516 (1968) . . . . . 5, 6, 7, 10, 11

*Long* v. *Sears Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997), petition for certiorari filed June 9, 1997 (docket no. pending) . . . . . 7

**TABLE OF AUTHORITIES - Continued**

*Page*

*Norfolk Redevelopment & Housing Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30 (1983) ..... 9

*Oberg* v. *Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), cert. denied, 511 U.S. 1108 (1994) ..... 7

*Oubre* v. *Entergy Operations, Inc.*, No. 96-1292 (cert. granted Apr. 21, 1997) ..... 1, 7, 8, 13, 14

*Rogers* v. *Missouri Pac. Ry.*, 352 U.S. 500 (1957) .. 10

*Wamsley* v. *Champlin Refining & Chem., Inc.*, 11 F.3d 534 (5th Cir. 1993), cert. denied, 115 S. Ct. 1403 (1995) ..... 6, 9, 13

*Wittorf* v. *Shell Oil Co.*, 37 F.3d 1151 (5th Cir. 1994) ..... 6

*Statutes:*

28 U.S.C. § 1292(b) ..... 4

29 U.S.C. § 621 *et seq.* ..... 1

29 U.S.C. § 626 ..... 1, 4, 11

**TABLE OF AUTHORITIES - Continued**

*Page*

45 U.S.C. § 51 *et seq.* ..... 5

45 U.S.C. § 55 ..... 10

*Miscellaneous:*

Equal Employment Opportunity Comm'n, *Waiver of Rights and Claims Under the Age Discrimination in Employment Act*, Proposed Rules, 62 Fed. Reg. 10787 (Mar. 10, 1997) ..... 11

Nager & Catlett, *Employees Can't Have Their Cake and Eat It Too: Estopping Age Discrimination Complainants Who Have Signed Releases*, 19 Employee Rel. L.J. 295 (1993) ..... 12

Restatement (Second) of Contracts § 7 ..... 7, 9

Restatement (Second) of Contracts § 85 ..... 9

## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 103 F.3d 1257. The unreported opinion of the district court (App., *infra*, 36a-60a) may be found at 1994 WL 780899 (E.D. Mich. Aug. 1, 1994).

## JURISDICTION

The judgment of the court of appeals was entered on January 9, 1997, and a timely petition for rehearing was denied on March 21, 1997. This petition is timely filed within 90 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Title II of the Older Workers Benefit Protection Act ("OWBPA"), an amendment to the Age Discrimination in Employment Act, is codified at 29 U.S.C. § 626(f) and is set out at App., *infra*, 61a-63a.

## STATEMENT

This case involves an important question of federal law that has sharply divided the courts of appeals–whether a terminated employee who signed a release of age discrimination claims must tender back the consideration received for doing so before contesting the validity of the release under OWBPA and bringing suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* On April 21, 1997, this Court granted certiorari on the same issue in *Oubre* v. *Entergy Operations, Inc.*, No. 96-1291. We request that the Court grant certiorari in this case and consolidate it with *Oubre*, or alternatively hold this petition for disposition in light of the Court's ruling in *Oubre*.

In November 1992, Michigan Bell Telephone Company ("Michigan Bell") and Ameritech Services, Inc. ("ASI") implemented separate Workforce Resizing Programs designed to reduce the number of managers through voluntary and involuntary terminations.[1/] The voluntary programs permitted any management employee to retire early and receive two additional years of service credit, a supplemental payment, and a favorable interest rate for purposes of calculating lump sum pension distributions. The separate involuntary programs were implemented in two phases. In the first phase, employees in an "at-risk pool," consisting of the lowest-performing managers (determined based on incentive payments and bonuses) were grouped according to salary grade and then subdivided into smaller groups to facilitate comparisons of their performance. In the second phase, employees in the at-risk pool were classified based on ratings of their job performance, specific job skills or expertise, leadership ability, and potential for growth. Those employees with the lowest ratings were selected for termination. App., *infra*, 5a-6a.

All the plaintiffs were involuntarily terminated, with the exception of Raczak, who volunteered for early retirement. The plaintiffs each received a proposed contract offering supplemental pension payments and other benefits in return for signing a waiver and release of claims. In accordance with OWBPA, plaintiffs were given in excess of

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[1/] Plaintiffs Raczak, Surma, Holmes, and Moore worked for Michigan Bell. The other plaintiffs worked for ASI. Both companies are direct or indirect subsidiaries of petitioner Ameritech Corporation, and petitioners will be referred to herein collectively as "Ameritech."

45 days to consider the offer and were urged to consult with an attorney before executing any waiver. Plaintiffs all executed the releases. They received supplemental pension payments ranging from $22,275.05 to $72,690.27, as well as other benefits, in consideration for executing the releases. App., *infra*, 6a-7a & n.4.

Despite their release contracts, plaintiffs sued Ameritech under the ADEA and OWBPA very soon after receiving their benefits, alleging that they had been selected for termination under the resizing programs based on their age. Prior to filing suit, plaintiffs did not return (or even offer to return) any of the compensation they had received in exchange for signing the waiver and release. Ameritech countersued for breach of contract, claiming that plaintiffs had agreed to waive such claims in return for compensation, that they had ratified their waivers by retaining that compensation, and that their refusal to tender back the compensation barred them from challenging the validity of the waiver agreements. App., *infra*, 2a, 9a.

Both sides moved for summary judgment. On August 1, 1994, the district court granted plaintiffs' motion and denied Ameritech's. While recognizing that Ameritech had otherwise complied with all OWBPA requirements for waivers, the court ruled that the waivers were unenforceable because Ameritech had deviated from OWBPA in one respect: it had furnished plaintiffs with a list of employees eligible or selected for termination, as well of those not eligible or selected, based on age and salary grade rather than by age and job title. The district court also ruled that plaintiffs' acceptance and retention of supplemental pension benefits did not ratify the defective waivers and did not preclude them from bringing suit. The court reasoned that

imposing such a tender-back requirement would be inconsistent with the remedial purposes of OWBPA and would "deter meritorious challenges to releases." App., *infra*, 58a-60a.

The district court certified its order for immediate appeal pursuant to 28 U.S.C. § 1292(b). The Sixth Circuit agreed to hear Ameritech's appeal on two issues: (i) whether Ameritech violated OWBPA by furnishing plaintiffs with the requisite data by salary grade rather than job title; and (ii) whether plaintiffs' refusal to refund the compensation they received for waiving claims against Ameritech precluded them from challenging the validity of the waivers. App., *infra*, 3a-4a.

On the first issue, the court of appeals unanimously ruled in favor of Ameritech, holding that the district court's "rigid and mechanical" interpretation of § 626(f)(1)(H) was inconsistent with the "ambiguous" language of the provision and "elevate[d] form over substance." The court remanded with instructions to determine whether the data that Ameritech supplied to plaintiffs fulfilled OWBPA's requirements by providing information, "in a manner calculated to be understood by the individual" participant, sufficient to allow the individual to understand and gauge the prospects of an ADEA claim. App., *infra*, 4a-5a.

On the second issue, the panel issued three opinions, with Judges Jones and Guy ruling in favor of plaintiffs and Judge Boggs dissenting. Judge Jones noted that the federal circuits are sharply divided over whether plaintiffs must tender back consideration received in return for a waiver of claims before bringing suit. He sided with the circuits rejecting a tender-back requirement, for several reasons.

First, he maintained that this Court's two-page per curiam decision in *Hogue* v. *Southern Ry.*, 390 U.S. 516 (1968), which held that injured employees are not required to tender back payments received prior to bringing suit under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, governs this question. App., *infra*, 31a. Second, he stated that requiring plaintiffs to tender back the extra benefits would be inequitable because it would deter meritorious ADEA filings by forcing potential plaintiffs to choose between dropping their claims and keeping benefits or surrendering benefits to pursue a claim that might take years to resolve. *Ibid.* Third, Judge Jones suggested that it would be more appropriate to permit plaintiffs to retain benefits and, if their claims eventually are successful, to subtract those benefits from the judgment amounts. *Id.* at 32a. Finally, he opined that a tender-back requirement would conflict with the intent of Congress in enacting OWBPA to protect older workers against the danger of waiving meritorious age discrimination claims. *Id.* at 33a.

Judge Guy concurred in the result, but on the ground that plaintiffs' suit did not result in "a total failure of consideration" for the additional benefits received by plaintiffs, because the release at issue was a general release and was not limited solely to ADEA claims. App., *infra*, 34a.

In dissent, Judge Boggs agreed with the federal circuits requiring potential plaintiffs to tender back benefits received for a waiver of claims prior to bringing suit. He reasoned that OWBPA did not abrogate the common-law principle that a contracting party forfeits its right to enforce a contract if, upon learning of a flaw in the contract that makes it voidable, it fails to return the consideration received in return for its promise to perform the now

voidable duty. Judge Boggs also maintained that this Court's "short and unsigned" *Hogue* decision is not dispositive because it rested on statutory language particular to FELA and on a factual scenario that amounted to a settlement of an unquestionably legitimate claim as opposed to release from uncertain liability. Finally, noting that waiver agreements of this type constitute bargains that benefit both employers and employees, he expressed concern that the majority's decision would completely deny employers the benefits of those bargains and permit employees seeking a better outcome to repudiate them at no cost. App., *infra*, 26a-28a.

## REASONS FOR GRANTING THE PETITION

### I. IN RULING AGAINST A TENDER-BACK REQUIREMENT, THE SIXTH CIRCUIT JOINS THE THIRD, SEVENTH, AND ELEVENTH CIRCUITS IN A SHARP CONFLICT WITH DECISIONS OF THE FOURTH AND FIFTH CIRCUITS

The circuit courts of appeals are sharply divided over whether a former employee must tender back consideration received for a waiver of claims prior to bringing an ADEA suit.

The Fourth and Fifth Circuits hold that failure to tender back benefits precludes the bringing of such a suit. *Blistein* v. *St. John's College*, 74 F.3d 1459, 1465-1466 (4th Cir. 1996); *Wittorf* v. *Shell Oil Co.*, 37 F.3d 1151, 1154 (5th Cir. 1994); *Blakeney* v. *Lomas Information Sys., Inc.*, 65 F.3d 482, 484 (5th Cir. 1995), cert. denied, 116 S. Ct. 1042 (1996); *Wamsley* v. *Champlin Refining & Chem., Inc.*, 11 F.3d 534, 538 (5th Cir. 1993), cert. denied, 115 S. Ct. 1403 (1995). The Fifth Circuit reaffirmed its position on this

question by affirming without opinion the district court's grant of summary judgment in favor of the employer in *Oubre*. 102 F.3d 551 (5th Cir. 1996) (Table), cert. granted, No. 96-1291 (Apr. 21, 1997).

These circuits hold that OWBPA does not render defective waivers void but only voidable. The importance of the distinction is that at common law, voidable contracts may be ratified, but void contracts may not. See Restatement (Second) of Contracts § 7 cmt. a. Applying these principles, these courts hold that a former employee's retention of benefits received for the waiver ratifies the waiver's terms despite any flaws in the waiver. Accordingly, the former employee may not bring an ADEA suit without first tendering back the consideration received for the waiver not to sue.

On the other side of the divide, holding that OWBPA does not require a tender back of benefits before bringing an ADEA claim, the Sixth Circuit in this case has joined the Third and Seventh Circuits. *Long* v. *Sears Roebuck & Co.*, 105 F.3d 1529, 1536 (3d Cir. 1997), petition for certiorari filed June 9, 1997 (docket no. pending); *Oberg* v. *Allied Van Lines, Inc.*, 11 F.3d 679, 682 (7th Cir. 1993), cert. denied, 511 U.S. 1108 (1994). These courts hold that the failure of a release to comply with OWBPA renders the release invalid and not subject to the tender-back requirement. They rely heavily on the decision of this Court in *Hogue*, which rejected a tender-back requirement in the context of a release of FELA liability. In addition, the Eleventh Circuit held (pre-OWBPA) that tender back is not required. *Forbus* v. *Sears Roebuck & Co.*, 958 F.2d 1036, 1040 (11th Cir.), cert. denied, 506 U.S. 955 (1992).

Many employers, including Ameritech, operate across the country in different federal circuit court jurisdictions. The widening split among the courts of appeals undermines efforts by these employers to enact uniform procedures for compensating terminated employees in return for a knowing and voluntary waiver of claims. As in *Oubre*, this Court should grant review to resolve the conflict among the circuits and end confusion on a recurring issue of great practical importance to employers and employees throughout the country.

## II. THE SIXTH CIRCUIT'S DECISION MISCONSTRUES THE MEANING OF OWBPA AND VIOLATES WELL-ESTABLISHED PRINCIPLES OF WAIVER AND TENDER BACK

The plaintiffs in this case received tens of thousands of dollars in return for their promises not to embroil their former employer in litigation. Now, they want both to void the deal and to retain what they received in return for making that promise. Such opportunistic gamesmanship not only is inequitable, but the common law rejected it and OWBPA does not authorize it.

### A. OWBPA Does Not Abrogate The Common Law Tender-Back Doctrine

OWBPA provides no indication that Congress intended to eliminate contract law principles of tender back and ratification. OWBPA simply sets forth what is necessary for a waiver to be knowing and voluntary. OWBPA neither bars the ratification of a defective waiver nor delineates what is required for ratification to occur. For that reason, OWBPA does not occupy the field on waiver issues, and courts must look to the common law.

At common law, a release of claims is valid and enforceable so long as it is "knowing and voluntary." That is, the employee must understand that he is releasing particular claims and do so without coercion. If a former employee contends that a release was not knowing and voluntary and challenges its validity and enforceability, he must return the consideration received for signing the release before bringing suit. *E.g., Cumberland & Ohio Co.* v. *First American Nat'l Bank*, 936 F.2d 846, 850 (6th Cir. 1991). These principles derive from the contract doctrine of ratification. A contracting party who fails to return the consideration is deemed to have ratified the terms of a voidable contract and to have entered into a new contract upon those same terms. Restatement (Second) of Contracts § 7 cmt. a, § 85. Accordingly, the ratifying party is precluded from challenging the enforceability or validity of the original contract because it has been superseded by the new contract. See *Wamsley*, 11 F.3d at 540 n.11. These principles prevent a party from accepting the benefits of a contract while avoiding its obligations.

OWBPA preempted the common law as to the adequacy of releases but not as to ratification and tender back. This Court has long held that statutes are not in derogation of the common law unless Congress so stated in "clear and explicit" language. *Norfolk Redevelopment & Housing Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983) ("the common law * * * ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose"), quoting *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812). There is *no* language in OWBPA, much less "clear and explicit" language, indicating an intent to overthrow the common law

principles of ratification and tender back in the context of ADEA waivers. Congress is presumed to know the state of the law when it enacts legislation. *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979). Congress would have expressed an intent to preclude ratification of waivers if it had intended to make such a modification in the law.

This Court's *Hogue* opinion is not to the contrary. Hogue injured his knee while working in the railroad repair shop of his employer. He accepted the employer's offer of $105 as part of a release after being told by the carrier's doctor that his knee was only bruised. When Hogue learned that in fact his injury was substantial and permanent, he sued under FELA, alleging mutual mistake of fact with regard to the release, without returning the consideration. The Court held that he was not required to do so before suing under FELA, reasoning that a tender-back requirement would be "wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers." 390 U.S. at 518. Instead, the Court ruled, "it is more consistent with the objectives of the Act [that] the sum paid [for the release] shall be deducted from any award determined to be due to the injured employee." *Ibid.*

*Hogue* was decided in a wholly different statutory and factual context from that of the ADEA waiver cases. The Court was able to dispose of the case in a two-page, unsigned opinion because the statutory language in FELA is so dispositive. FELA expressly makes waivers "void" (45 U.S.C. § 55), and thus FELA's enactment clearly repealed the common law doctrines of ratification and tender back in the context of FELA claims. See *Rogers* v. *Missouri Pac. Ry.*, 352 U.S. 500, 507-508 (1957) (FELA created a statu-

tory scheme that "stripped [an employer] of his common-law defenses"). OWBPA, in contrast, expressly permits waivers that meet its criteria. 29 U.S.C. § 626(f)(2). Contrary to the Sixth Circuit's view, *Hogue* is not controlling and the common law ratification and tender-back doctrines should be followed under OWBPA.

### B. The Sixth Circuit's Misconstruction Of OWBPA Seriously Harms Employers And Employees Alike

The Equal Employment Opportunity Commission ("EEOC") recently estimated that over 13,700 employers per year offer severance packages in return for waivers. *Waiver of Rights and Claims Under the Age Discrimination in Employment Act*, Proposed Rules, 62 Fed. Reg. 10787 (Mar. 10, 1997). Each of these employers has at least 20 employees, so the number of persons affected by the construction of OWBPA is vast. The EEOC has proposed regulations governing the waiver provisions in OWBPA, adopting the recommendations of a 20-person committee composed of management, employee, and EEOC representatives. However, the committee was unable to reach consensus on whether a tender back of benefits received for a waiver is required before pursuing an ADEA claim, and the EEOC has not addressed that issue in its proposed rule. *Ibid.* Given the significant impact of the issue on so many persons, and the inability of even the implementing agency to resolve it, this Court's intervention is vital.

The decision below undermines the finality of releases and waivers of ADEA claims and thus is likely to make extra-compensation packages for terminated employees less available, to the detriment of both employers and the

vast majority of employees who have no valid discrimination claims. These agreements enable employers to limit potential litigation and liability and thus gain a measure of control over their budgets, and they enable employees to obtain substantial compensation and other benefits above and beyond the normal severance package. See Nager & Catlett, *Employees Can't Have Their Cake and Eat It Too: Estopping Age Discrimination Complainants Who Have Signed Releases*, 19 Employee Rel. L.J. 295, 296-297 (1993).

By enabling employees to challenge the validity of releases and yet retain the consideration received for those releases, the holding of the court of appeals effectively compels employers to subsidize their employees' litigation. Indeed, it actually encourages former employees to mount challenges to releases, because they can seek discrimination damages without putting the compensation they received at risk. Such suits abrogate the bargain made with the employer at termination and will make employers less willing to enter into releases, thereby frustrating the purpose of Congress. Employers are willing to pay extra severance compensation as part of such release agreements primarily to head off the expense, disruption, and unfavorable publicity attendant upon litigation. Those benefits become chimerical if former employees can keep the extra payments and still force their employers to litigate.

Employees as well as employers would be damaged by the court of appeals' approach. Because employers provide consideration in return for releases in order to avoid the expense and distraction of litigation, the Sixth Circuit's rule destroys the value of releases to employers and would greatly reduce the likelihood that employers would provide that additional consideration. Congress surely did not intend

to diminish the possibility that employees would be offered valuable benefits; yet that is the logical consequence of the construction of OWBPA adopted by the Third, Seventh, Eleventh, and now the Sixth, Circuits.

## III. AT A MINIMUM, THIS COURT SHOULD HOLD THE PETITION FOR DISPOSITION IN LIGHT OF ITS RULING IN *OUBRE*

On April 21, 1997, the Court granted certiorari in *Oubre* v. *Entergy Operations, Inc.*, No. 96-1291, on this question: "Did petitioner ratify [an] otherwise invalid release by retaining compensation paid and/or failing to tender back said sums received pursuant to terms of her separation of employment, thus making release binding?" The petitioner in that case, Dolores Oubre, signed a release of claims in return for a severance benefit package after being discharged. She then brought an ADEA claim without tendering back the severance benefits. The district court granted summary judgment to the employer, based on the Fifth Circuit's holdings in *Wamsley* and *Blakeney* that an employee's failure to tender back such benefits ratifies the waiver. Pet. App. in No. 96-1291, at A-5. The Fifth Circuit affirmed without opinion. 102 F.3d 551 (Table).

The question presented in *Oubre* is essentially identical to that before the Court in this case. It would therefore be appropriate, as an alternative to granting certiorari and consolidating this case with *Oubre*, to hold this petition for disposition in light of the Court's ruling in *Oubre*.

## CONCLUSION

The petition for a writ of certiorari should be granted and this case consolidated with *Oubre* v. *Entergy Operations, Inc.*, No. 96-1291. Alternatively, the petition should be held for disposition in light of this Court's ruling in *Oubre*.

Respectfully submitted.

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JUNE 1997

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Gary RACZAK, Bernard Surma, Loraine Holmes, Gladys Moore, Carole Chandler, Lou Ann Fox, M. Jean Kruse, Phyllis Tarpley, and Thomas Satkiewicz, Plaintiffs-Appellees,**

v.

**AMERITECH CORPORATION, Ameritech Services, Inc. and Michigan Bell Telephone Company, Defendants-Appellants.**

No. 95-1082.

Argued Aug. 4, 1996.

Decided Jan. 9, 1997.

Rehearing and Suggestion for Rehearing En Banc Denied March 21, 1997.

Before: JONES, GUY, and BOGGS, Circuit Judges.

BOGGS, J., delivered the opinion of the court in Parts I and II, in which JONES and GUY, JJ., concurred. JONES, J. (pp. 24-28), delivered a separate opinion with respect to the issue addressed in Part III, in which GUY, J. (p. 29), concurred in a separate opinion, making Judge JONES's opinion the opinion of the court on the Part III issue.

BOGGS, Circuit Judge. Plaintiffs Gary Raczak, Bernard Surma, Loraine Holmes, and Gladys Moore worked for defendant Michigan Bell Telephone Co. Plaintiffs Carole Chandler, Lou Ann Fox, M. Jean Kruse, Phyllis Tarpley, and Thomas Satkiewicz worked for defendant Ameritech Services Corp., a subsidiary of Ameritech Corp. They sued their employers under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, as amended by the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626 *et seq.*, alleging that they were selected to be fired under defendants' workforce reduction programs solely on the basis of their age.[1/]

Defendants countersued for breach of contract, claiming that plaintiffs received enhanced severance packages in return for waiving such claims, and that plaintiffs' continued refusal to disgorge the benefits bars them from contesting the agreements' validity.

Both sides moved for summary judgment. In an order dated August 1, 1994, the district court denied defendants' motions and granted plaintiffs' motion. The court held that the defendants had not furnished the terminated employees with "the job titles and ages of all individuals eligible or selected for the [downsizing] program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program," as required by 29 U.S.C. § 626(f)(1)(H)(ii). Instead, defendants had categorized the

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1/ Plaintiffs originally sued for defamation as well, but have since withdrawn that cause of action.

information on the employees selected and not selected by age and salary grade. Although plaintiffs and the court conceded that this was the only provision of the OWBPA that was alleged to have been breached, the court held that this flaw rendered the waivers unenforceable.

The district court also held that plaintiffs' acceptance and continued retention of the enhanced compensation benefits did not "ratify" the defective waivers, and therefore did not preclude plaintiffs from bringing suit. The court reasoned that such a "tender-back" requirement would be inconsistent with the remedial purposes of the OWBPA and would "deter meritorious challenges to releases." *Memorandum and Order of Aug. 1, 1994* ("*Memorandum and Order*") at 20-21. If plaintiffs were to prevail in their suit, the court noted that "any such recovery would be offset against the benefits they've already received from [defendants]." *Id.* at 21. It is not clear if plaintiffs agree with this statement by the court.

Defendants then asked the court to certify its order for interlocutory appeal because the order "involves a controlling issue of law as to which there is a substantial ground for difference," and that an immediate appeal could "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The district court agreed, and we granted the petition to appeal.

Although an interlocutory appeal allows this court to review the district court's order in its entirety, and thus any issue pertinent to the disposition of this case, we will review only the two issues addressed by the district court

in its grant of summary judgment:[2] (1) whether defendants violated the OWBPA by providing plaintiffs with data organized by and relating to salary grade, in lieu of what plaintiffs characterize as "job title"; and (2) whether plaintiffs are precluded from suing by their refusal to refund the additional compensation that they received as an inducement for executing a waiver of liability.

Upon review and analysis, we reverse and remand the case to the district court. We unanimously conclude that because the nomenclature of § 626(f)(1)(H) of Title 29 is ambiguous, a rigid and mechanical interpretation of that provision is inappropriate. Congress's intent in enacting § 626 was to compel employers to provide data so that an employee considering waiving ADEA rights could assess, with the assistance of counsel, the viability of a potential ADEA claim. Although the OWBPA is lengthy and detailed, clause (H)(ii) of § 626(f)(1) is not as precise, referring to concepts of "job title," "job classification," and "organizational unit"—terms not defined within the OWBPA. Holding an employer strictly accountable for what might be a technical violation of these imprecise

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[2] In a post-oral argument submission, plaintiffs urge us to find that defendants violated ERISA, and that this fact voids the releases as being against public policy. Plaintiffs cite *Spink* v. *Lockheed Corp.*, 60 F.3d 616 (9th Cir. 1994), rev'd, 116 S.Ct. 1783 (1996) as authority, but they fail to note that in that case, "[t]he increased benefits [offered as consideration for the releases] were paid out of the Plan's surplus assets." *Id.* at 619. Not only is there no evidence that Ameritech or Michigan Bell dipped into its employees' pension fund, but plaintiffs have not alleged an ERISA claim, nor did they argue the issue before the district court. Therefore, we decline to address the issue.

terms, with no indication that this would facilitate the provision's purpose and might even hamper it, is untenable and would elevate form over substance. Accordingly, we remand to the district court with instructions to determine whether the data that defendants supplied to plaintiffs fulfilled the requirements of the OWBPA by providing information, "in a manner calculated to be understood by the individual" participant, that would allow that individual to understand and gauge the prospects of an ADEA claim.

The panel is split with respect to the question of ratification and the proper procedure upon remand. I would reverse on the issue of ratification as well, and in so doing, distinguish between the doctrine of ratification and the "tender-back" doctrine and adopt the latter. However, the remaining two members of the panel, for the varying reasons set forth in their separate opinions, agree that plaintiffs in this case may continue their suit upon remand without tendering back their waiver payments, and that view is thus the opinion of the court.

## I

In September 1992, Ameritech announced that it would be reducing the number of managers through voluntary and involuntary terminations through its Workforce Resizing Program. Under the *voluntary* retirement program, any management employee could retire early and receive two additional years of service credit, a supplemental payment, and a favorable interest rate in calculating lump sum pension distributions. These employees were required to select this option before November 2, 1992.

The remainder of the downsizing was to be accomplished through the involuntary termination component of the plan. In the first phase, Ameritech designated an "at-risk pool" consisting of the lowest-performing 30% of managers, based on 1990 and 1991 incentive payments and bonuses. Workers in these at-risk pools were grouped according to their salary grade (of which there were about twelve), and those in each salary grade were subdivided into smaller groups to create more manageable comparison groups (those in subgroups of less than ten were compared on a company-wide basis).

The second phase of the involuntary component involved classifying the at-risk employees based on assessments of their job performance, specified job skills or expertise, leadership ability, and potential for growth. Each employee was rated by the appropriate supervisor on each of the four factors, and the employees were ranked based on their average rating. After Ameritech vice-presidents determined how many employees needed to be trimmed to achieve the downsizing goals, the individuals to be terminated were selected anonymously, based on the lowest average performance ratings. Michigan Bell's Workforce Resizing Program was almost identical in its methodology and system of classification.

All of the Ameritech and Michigan Bell plaintiffs were involuntarily terminated, except for Raczak,[3/] who

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[3/] Raczak's situation differs slightly from that of his co-plaintiffs. His waiver was dated and notarized on November 9, 1992, and he withdrew the waiver on November 17, one day past the one-week grace period for revocation permitted by 29 U.S.C. § 626(f)(1)(G). However, Raczak claimed that he

took early retirement. Each employee received a packet describing the supplemental severance benefits available if the Michigan Bell plaintiffs would sign a "Termination Agreement, Waiver, and Release"; the Ameritech plaintiffs were offered a similar "Waiver and Release." All pages of both waiver forms were clearly labeled at the top with "***PLEASE CONSULT WITH AN ATTORNEY BEFORE EXECUTING THIS DOCUMENT***," as required by 29 U.S.C. § 626(f)(1)(E)[4/].

The waivers also satisfied the other conditions of 29 U.S.C. § 626(f)(1) because they were "written in a manner calculated to be understood . . . by the average individual"; the waivers referred specifically to ADEA claims; they did not waive rights arising after the date of execution of the waiver; each employee received consideration beyond that owing; employees were given 45 days to evaluate the waivers and incentives; and employees were given seven days to revoke a signed waiver. See *Memorandum and Order* at 10 ("Plaintiffs acknowledge that all but one of the requirements of 29 U.S.C. § 626 were met. . . .")

Additionally, all Michigan Bell plaintiffs (except for Raczak) received a chart listing the numbers of

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actually executed the waiver on November 10 and that he and the notary backdated it because he believed that he was required to sign it by the 9th. The district court was unpersuaded, and it rejected his renunciation. Nonetheless, the validity of Raczak's initial waiver became immaterial after the court found all of the plaintiffs' waivers defective.

[4/] The plaintiffs received bonuses ranging from $22,275.05 to $72,690.27.

employees "selected" and "not selected" for involuntary termination, broken down by age and salary grade; the same was true for Ameritech plaintiffs, except that Ameritech used the phrases "selected" and "retained." Ameritech also stated that it provided the names of all 6,600 employees and their ages, grades, and whether selected or not. JA at 565. This information was provided in order to comply with 29 U.S.C. § 626(f)(1)(H), the provision at issue in this case:

> (1) . . . a waiver may not be considered knowing and voluntary unless at a minimum—
>
> . . .
>
> (H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer . . . informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—
>
> (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
>
> (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Plaintiffs argue that defendants violated this section by using salary grade to stand for "job title," "job

classification," or "organizational unit," and that the failure to provide the information in an appropriate manner prevented them from accurately assessing whether they had a valid claim under the ADEA. Defendants contend that cataloging the information by salary grade was the best method of providing the data, because job titles did not adequately describe or identify an employee's position or prospects in the organization. Rather, positions with similar or the same job titles occur throughout several pay tiers, so that comparable titles are not comparable in any other respect. Further, using salary grade was appropriate because the defendants compared employees by salary grade in selecting persons to be terminated.

The plaintiffs first attempted to resolve their grievances through the EEOC. The Detroit Office of the EEOC initially concluded in May 1993 that "the waiver and release were executed in [sic] voluntary and knowing fashion, and . . . does not establish a violation of the statute." JA at 193, 196, 199. The EEOC was unable to mediate a resolution to the dispute, and the plaintiffs filed suit. However, in September 1994, after suit had been filed, the EEOC made a determination in which it stated that it made "no finding with regard to the issue of waivers." JA at 993, 996, 999. The plaintiffs have not returned any of the additional benefits that they received in exchange for signing the waiver agreement.

## II

This court reviews *de novo* the district court's grant of a motion for summary judgment. *Baggs* v. *Eagle-Picher Indus.*, 957 F.2d, 268, 271 (6th Cir.), cert. denied, 506 U.S. 975 (1992). Likewise, a district court's conclusions of law

are subject to *de novo* review on appeal. *United States* v. *Braggs*, 23 F.3d 1047, 1049 (6th Cir.), *cert. denied*, 115 S. Ct. 274 (1994); *Whitney* v. *Brown*, 882 F.2d 1068, 1071 (6th Cir. 1989). An appellate court must review the evidence "in the light most likely to support the district court's decision." *Braggs*, 23 F.3d at 1049, citing *United States v. Gomez,* 846 F.2d 557, 560 (9th Cir. 1988).

The OWBPA places the onus of proving a knowing and voluntary waiver squarely on defendants:

> In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph[s] [(A)-(H)] of paragraph (1) . . . have been met, the party asserting the validity of the waiver shall having the burden of proving . . . that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

29 U.S.C. § 626(f)(3).

Although several cases discuss the general criteria for finding an employment waiver to be knowing and voluntary, those cases are pre-OWBPA, so there is little law interpreting the degree of compliance required by § 626(f)(1)(H).

In the only published opinion specifically evaluating compliance under § 626(f)(1)(H)(ii), the district court enforced the waiver because the employer had satisfied all of the statutory elements. *Anderson* v. *Lifeco Serv. Corp.*, 881 F. Supp. 1500 (D. Colo. 1995). The court found the requirements of the clause were satisfied because "[t]he termination package included the *names* and *ages* of the other employees who were terminated as part of the

reduction in force and the *names* and *ages* of those employees unaffected by the reduction." *Id.* at 1503 (emphasis added). There is no mention of the listing including "job titles," so the *Anderson* court upheld the waivers despite an apparent lack of technical compliance with the statute's language.[5/] Another appeals court,

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[5/] The court below relied on two unpublished decisions rendered by the same district judge, *Adams* v. *Indiana Bell Tel. Co., Inc.*, IP 93 420 C (S.D. Ind. May 18, 1994), and *Allard* v. *Indiana Bell Tel. Co., Inc.*, IP 93 1346 C (S.D. Ind. May 18, 1994), which involved the same issue. The court recognized that to make a prima facie case of age discrimination in a suit challenging a reduction-in-force, a plaintiff must only show "a pattern of downsizing that could ultimately benefit a person not a member of the protected class." JA at 41 (*Allard*, slip op. at 12). In such cases, information relating age with job duties or skills is more probative for showing age discrimination because:

> [o]ne way to evaluate whether such a pattern exists is to look at the job titles and ages of all terminated employees and then compare that information with the ages of nonselected employees who perform similar or related work and are thus likely to take over the terminated employees' duties or perform jobs that the plaintiff is likely to be qualified to perform.... To make a similar evaluation under circumstances where the employer produces only the ages and *salary grades* of the selected and nonselected employees requires an assumption that employees within the same salary grade perform the same or related work. Such an assumption is not warranted. And, under a literal application of the statutory language, such an assumption is not allowed.

although ruling on a different issue, noted in passing that "[n]either 'job classification' nor 'organizational unit' is defined" in the OWBPA, but that the phrases should not be interpreted "contrary to their naturally broad meaning. . . ." *Griffin* v. *Kraft Gen. Foods, Inc.*, 62 F.3d 368, 372 (11th Cir.1995).

It is not clear whether, in drafting the statute, Congress "painted with a broad brush and left it to the courts to 'flesh out' the statute by fashioning a body of substantive federal law," so that we "may fashion a body of federal common law," or whether the statute contains "only gaps in definitions or descriptions" so that we may only "fill these interstices . . . [by] interpret[ing] or constru[ing]" these unclear provisions of the OWBPA. *Anspec Co.* v. *Johnson Controls, Inc.*, 922 F.2d 1240, 1245 (6th Cir. 1991) (citing *Texas Indus.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S. Ct. 2061, 2066, 68 L.Ed.2d 500 (1981)). On either basis, however, we hold that the terms "job title," "job classification," and "organizational unit" should be interpreted on a case-by-case basis, with an eye to the purposes of the Act, rather than as a dogmatic exercise in definition.

Since the key terms in clause (H)(ii) are not terms of art, and are not specifically defined in the statute, we must interpret what meaning should be given to "job title," "job classification," and "organizational unit" in the context of the waiver provisions of the OWBPA. At the conceptual level, Congress wanted to be sure that workers who signed a waiver had a clear idea of what they were

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JA at 41-42, Allard, slip op. at 12-13.

giving up, particularly that they had the ability to assess the value of the right to sue for a possibly valid discrimination claim.

At the procedural level, however, it is in the interest of a worker seeking to void a release to be dissatisfied with *any* methodology that the company used in attempting to comply with clause (H)(ii). Thus, a job title could be considered anything from an extremely specific, indeed unique, designation of the job slot ("RC Numbers"), to very specific title (e.g., "Attorney in charge of corporation taxes for Idaho"), to subspecialty ("tax lawyer"), to profession ("lawyer"), to rank ("supervisor or supervising lawyer"), to hierarchical position ("Vice-President"). Each of these might make sense, yet each of them also could be attacked as misleading and plaintiffs could claim that the "job title" used should have been supplanted by one of the others. Plaintiffs have put in the record two pages of a directory from one of the defendant companies, which purports to show a variety of actual "job titles" used by the company, and presumably is the kind of information that plaintiffs now contend is definitively demanded by the statute. Exhibit 2 to Plaintiffs' Brief in Response to Motion for Evidentiary Hearing. JA at 914-15. However, a perusal of those pages indicates the very complexity of the argument. In the space of two pages, a group of employees in apparently closely related employment are referred to by a variety of names ranging from simple "analyst" to "analyst-installation" to "analyst-Michigan CA7 support" to "analyst" with a variety of geographic qualifiers, to "senior analyst." Had the defendants simply turned over this booklet, with the necessary ages and selection results appended, plaintiffs could certainly have

made a strong complaint that that information was not usable or understandable. Similarly, had defendants grouped the varieties of "analysts" in any of a number of quite plausible ways, it could certainly have been contended that a differing methodology would have been instead the single "job title" sought by the statute.

Similarly, the "organizational unit" has been the subject of comparable attacks. In *Griffin*, a claim that other job types at other plants should have been included was accepted. 62 F.3d at 372-73. In the case of *Long* v. *Sears Roebuck & Co.*, No. CIV. A. 95-0141, 1996 WL 94537 (E. D. Pa., Mar. 1, 1996), a claim was made that information on those not selected should have been given not just for the Sears facilities affected by the lay-offs, but for Sears employees *either* (a) nationwide or (b) within Pennsylvania. *Id.* at *4-*5. The district court did not rule on this point, simply holding that there was sufficient factual dispute that summary judgment was precluded. *Id.* at *8. This again shows how a rigid concept that there is only one correct "organizational unit" can be used to attack the validity of any waiver. As with job titles, it is in the interest of the worker trying to void the release to quibble with whatever definition was used by the company.

At the same time, it is certainly possible that an employer will want to fiddle with the definition to mask the possible evidence for age discrimination. Thus, as a speculative example, if the company had actually decided to fire all the old tax lawyers, but not to touch other lawyers, or to be non-discriminatory in its treatment of all other lawyers, it would be in its interest to use a wider category such as all lawyers, to disguise the smaller sub-unit of discrimination. On the other hand, using very small

sub-units could also mask discrimination because it is much more difficult to show or perceive discrimination when only very small numbers are involved. Cf. *Black* v. *City of Akron*, 831 F.2d 131 (6th Cir.1987). The so-called "4/5ths Rule," 29 C.F.R. § 1607.4D (1987), notes that small samples make a finding of discrimination difficult. See *Fudge* v. *City of Providence Fire Dep't*, 766 F.2d 650, 658 n. 10 (1st Cir. 1985), cited in *Black*, 831 F.2d at 134.

So, we return to the question of how best to interpret this section in terms of the intent of the statute, as well as the words used. The touchstone should be the "understandable to the average worker" standard. If the employer provides information that purports to comply with the statute, then the inquiry should move to the question of understandability. Here, the company did provide the exact ages of all workers, and whether they were selected or not, by what it calls "job title"—the salary grade—as well as either the organizational unit (which defendants say is the entire company), or else the job classification of all those not selected—also the salary grades.

This should be enough to prevent summary judgment for the employees at this stage. At the same time, the argument they raised, that the salary grade classification was not the way workers thought of themselves and their jobs, should be enough to prevent summary judgment for company, at this stage. We note that plaintiffs themselves use varying terms, almost interchangeably. Within less than one page of their brief, pages 3-4, they refer to "department," "division," "segment," "departmental unit," "work group," and "work unit."

On remand, the district court should focus on the question of understandability to a worker who is trying to assess whether age discrimination actually occurred, and trying to assess what the prospects of a suit would be, whether or not discrimination actually occurred.

In this inquiry, some of the factors that will be relevant, without seeking to be exhaustive, will include:

— Whether the company used its proffered titles and classifications in its work processes, prior to the layoffs;

— Whether the titles and classifications were used in assessing or choosing workers for layoffs;

— Whether the titles and classifications were meaningful to the average worker in his or her understanding of the workplace and the layoff process.

These are matters on which further discovery or an evidentiary hearing should be held below. The district court should then rule on whether clause (H)(ii) has been satisfied, based on the criterion of whether the employer provided the required information in a form, whatever the exact nomenclature, that is understandable to the average worker in voluntarily deciding to give up the right to sue.

The inquiry of the district judge in this case was defective only in focusing ultimately on a formal consideration of whether a particular form of words was a "job title" or not, rather than inquiring as to the suitability of the information furnished in satisfying the goal of the statute.

We note that the statute requires that the data be in a form "calculated to be understood by the *average individual eligible to participate*," so the court should consider whether categorizing managerial employees by salary grade is sufficiently informative for its audience of eligible employees—in this case, managerial employees. Defendants assert that to this group, a formal title such as "manager" or "director" actually conveys *less* information than the salary grade.

Depending on the factual situation of the organization, a salary grade or hierarchical level may be the most meaningful description. Thus, in the military, a "Captain" may command an infantry unit or manage a complex repair function, but at promotion time and in many other situations, the rank itself is the most meaningful description. Similarly, in the civil service, a rating as GS-12 or GS-15 may be more meaningful than a formal civil service job title, which may be only something like "analyst" or "attorney-advisor," regardless of the type of tasks actually performed.

The district court must also assess whether salary grade classifications provide a basis for comparing equivalent positions in order to assert intentional age discrimination based on circumstantial evidence of statistical differences. Additionally, the defendants selected the individuals to be terminated from a pool of employees organized by their salary grade, so the district court must determine whether categorizing the data in this manner is reasonable and appropriate under the facts of this particular case. Finally, although the district court specifically rejected plaintiffs' attack on the defendants' method of determining what employees should be counted

as "selected" or "retained," and held that the method of classifying employees as selected or not selected "complied with the requirements [of OWBPA],"[6/] plaintiffs' challenge to the understandability of that distinction may also be taken into account in making the ultimate determination on the suitability of the information.

## III

As noted above, I disagree with the remainder of the panel as to whether plaintiffs may maintain their suit for age discrimination, in the face of their own signed waivers, for which they received tens of thousands of dollars, without returning the money they received for a promise they no longer intend to keep. This tender-back doctrine is closely related to the contractual principle of ratification: if a party was induced to make a contract through mistake, fraud or duress, his failure to repudiate the contract upon discovering the flaw (and hence the voidable nature of the contract) constitutes a new promise to perform the previously voidable duty. Those circuit that have found a tender-back requirement for suits challenging ADEA releases have concluded that an employee's retention of the enhanced severance benefits after learning that his release is voidable makes a new promise to honor the waiver despite any technical flaws. *Wittorf* v. *Shell Oil Co.*, 37 F.3d 1151, 1154 (5th Cir.1994) (enforcing waiver of ADEA, ERISA, and ADA claims because plaintiff kept extra severance benefits); *Wamsley* v. *Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993).

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6/ *Memorandum and Order* at 12.

In *O'Shea* v. *Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), cert. denied, 502 U.S. 859 (1991), the Fourth Circuit applied "ordinary contract principles" both in finding a waiver valid and in holding that plaintiff ratified the waiver by retaining the benefits of a voidable contract—plaintiff could not "have it both ways." 930 F.2d at 362-63. However, the court admitted that Congress had "done no more than leave the law in its nascent state." *Id.* at 361. There have been some doubts of *O'Shea's* continued vitality after the OWBPA amendments. N. Jansen Calamita, *The Older Worker's Benefit Protection Act of 1990: The End of Ratification and Tender Back in ADEA Waiver Cases*, 73 B.U.L. Rev. 639, 648 (1993) (noting that the argument for abolishing the tender-back doctrine "is based not on the specific provisions or legislative history of the OWBPA."). Indeed, on precisely that basis, a district court in the Fourth Circuit recently refused to follow *O'Shea*, noting:

> The court in *Wamsley* stresses the value of 'giv[ing] effect to private agreements.' However, in the OWBPA, Congress was trying to protect older workers from private agreements which were unduly coercive. Permitting subsequent ratification of those agreements undermines the very purposes which the OWBPA sought to achieve.

*Blistein* v. *St. John's College*, 860 F. Supp. 256, 262 (D. Md.1994). However, the Fourth Circuit firmly reversed the district court, and reaffirmed its application of the common law principle of ratification. *Blistein* v. *St. John's College*, 74 F.3d 1459, 1465-66 (1996).

The district court in this case was persuaded by the contrary view of the Seventh and Eleventh Circuits in *Oberg* v. *Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir.1993), cert. denied, 114 S. Ct. 2104 (1994), and *Forbus* v. *Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), cert. denied, 506 U.S. 955 (1992). Those cases held that any release not complying with OWBPA was void, not merely voidable, and thus the common law requirement to tender back would not apply. Both cases relied heavily on the Supreme Court's decision in *Hogue* v. *Southern Ry.*, 390 U.S. 516, 88 S. Ct. 1150, 20 L. Ed. 2d 73 (1968), a two-page per curiam opinion in which the Court rejected a tender-back requirement in the context of a release of FELA liability. The district court specifically agreed with the *Forbus* court, which did not want to "deter meritorious challenges" and worried that the added expense of returning the benefits would "encourage egregious behavior on the part of employers in forcing certain employees into early retirement...." 958 F.2d at 1041.

In addition to relying on *Hogue*, the Seventh Circuit in *Oberg* justified its rejection of ratification mainly on the OWBPA's displacement of state law, and with it, common law doctrines. *Oberg* interpreted the dominant policy in the OWBPA as preventing the loss of rights under the ADEA unless the decision is fully voluntary. Several other courts have followed *Oberg's* lead. *Forbus* v. *Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir.1992); *EEOC* v. *Sara Lee Corp.*, 923 F. Supp. 994, 998 (W.D.Mich. 1995) (relying in part on the district court opinion in *Blistein*, which has been reversed by the Fourth Circuit, as noted above at 16); *Soliman* v. *Digital Equip. Corp.*, 869 F. Supp. 65, 69 (D.Mass.1994) (court followed *Hogue*, though noting that

that case was governed by FELA, and that liability was conceded, as distinct from the instant cases); *Carr* v. *Armstrong Air Conditioning*, 817 F. Supp. 54, 58 (N. D. Ohio 1993) (court relied on *Hogue*, and stated that "any benefits paid by defendants shall be set off from any damage award received by plaintiff.").

In the recent case of *Long* v. *Sears Roebuck & Co.*, No. CIV. A. 95-0141, 1996 WL 94537 (E. D. Pa., Mar. 1, 1996), Judge Giles canvassed the conflicting state of the law in very much the terms that I have set out above. In that case, Sears Roebuck provided releases that purported to comport with OWBPA. Plaintiffs challenged this compliance because they believed that the "organizational unit" should include persons employed at other locations operated by the company. Judge Giles held that this raised a factual issue that could not be decided on summary judgment, and went on to consider the tender-back requirement. He noted that this question turned on whether "a release that fails to comport with OWBPA [is] void *ab initio* ... or voidable...." *Id.* at *5. After canvassing the distinction between the Seventh Circuit case of *Oberg* and the Fifth Circuit case of *Wamsley*, the court held that it was "persuaded that *Wamsley* is the correct analysis to be employed in determining the enforceability of an alleged waiver of rights under the ADEA." *Id.* at *6. *Accord Hodge* v. *New York College of Podiatric Medicine*, 940 F.Supp. 579, 582-84 (S.D.N.Y.1996); *Bilton* v. *Monsanto Co.*, 1996 WL 694134, *8 (E.D. Mo. Nov. 22, 1996). The court also noted that it believed that this holding was consistent with precedent in the Third Circuit, *Ponzoni* v. *Kraft Gen. Foods*, 774 F.Supp. 299 (D.N.J. 1991), *aff'd*, 968 F.2d 14 (3d Cir. 1992). In that case, the opinion

considered the same two issues we have before us today: the adequacy of a release, and the effect of the retention of consideration. As Judge Giles noted, the adequacy of release issue has been superseded by the OWBPA, which laid down new rules, but the statute did not disrupt the second step of this analysis. *Id.* at *8.

Because the Supreme Court has been silent on the issue of waivers since deciding *Hogue* in 1968, that case, though short and unsigned, warrants more detailed scrutiny. Hogue had injured his knee while working in the defendant railroad's repair shop, and he was offered and accepted $105 as part of a release. The carrier's doctor had assured both parties that the knee was only bruised; later, the damage was found to be permanent, and Hogue had to undergo two operations, one of which required the removal of a kneecap. Hogue sued under FELA, since the railroad was included under the Act, alleging mutual mistake of fact in the release. He did not offer to return the $105 before instituting the action. The Supreme Court held that Hogue was not required to tender back the consideration.

I believe that several aspects of *Hogue* have been overlooked. First, "[t]he question of whether a tender back of consideration was a prerequisite to the bringing of [a] suit is to be determined by federal rather than state law." *Hogue*, 390 U.S. at 517. *Hogue* also relies specifically on the language of FELA, 45 U.S.C. § 55, which explicitly makes any device to exempt an employee from liability "void." Therefore, whether the OWBPA displaced state and common law doctrines is irrelevant—general principles of equity and contract law exist with equal vitality in the federal sphere. The Supreme Court has also held that statutes in derogation of the common law must be

stated in clear and explicit language. *Norfolk Redevelopment & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983) ("the common law ... ought not to be deemed repealed, unless the language of the statute be clear and explicit for this purpose," quoting *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623, 3 L.Ed. 453 (1813)). This was done in FELA but not in OWBPA. The Seventh Circuit's rejection of ratification on this basis is thus unconvincing. *Oberg*, 11 F.3d at 683 ("Had Congress not spoken this court may have even been inclined to follow *Grillet* and *O'Shea*, and allow employees the freedom to ratify their severance agreements through general principles of contract law. However, Congress has occupied this area of law through the enactment of the OWBPA.").

Second, this point is reinforced by evidence in *Hogue* that the tender-back requirement is a generally recognized exception under federal common law:

> We reject the suggestion that a tender back of the consideration is excused only where fraud enters into the execution of the release. We hold that a tender back is also not requisite when it is pleaded that the carrier and the employee entered into the release from mutual mistake as to the nature and extent of the employee's injuries.

*Hogue*, 390 U.S. at 517 (citations omitted). This language seems to carve out fraud and mutual mistake as the two exceptions to the general rule.

Third, *Hogue* dealt with a situation where the *fact* of injury was never in doubt. As such, Hogue's release was less a release from *potential liability* than it was a

settlement of a legitimate claim. In contrast, a substantial number of the employees to whom these agreements are offered could not possibly have been discharged in violation of the ADEA and do not have a valid claim. As such, they would not be entitled to anything beyond the standard severance benefits and, in a sense, receive a windfall from these waiver payments. Asking an employee who has suffered no harm to return these benefits works no hardship on him, although allowing him to keep the money and sue completely denies the company the benefit of its bargain—abolishing the tender-back rule gives every employee two chances to settle his case.

The company, of course, has also benefitted by staving off the uncertain expense of future suits. These waivers are more cost-effective than settling a lawsuit because they occur before any litigation begins, and thus reduce attorney costs, do not require a case-by-case assessment, and preempt discovery and its attendant costs. Accordingly, employers may well pay more for a standard waiver than they would in a standard settlement.

Because the releases are offered to *all* employees, both victims of discrimination and not, the value of the offered incentive will increase with the frequency of legitimate ADEA claims.[7/] This leads to a final inequity: *Hogue's*

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[7/] Roughly, the company should offer benefits that approximate [the nuisance value of a groundless suit + (the average value of a successful ADEA suit x the average likelihood of proving that an employee was illegally discharged)]. Because ADEA suits can be lucrative (perhaps because all jurors can empathize with and envision growing old), even a small number of plausible ADEA claims can

consolation that, in the event of a recovery, "the sum paid [for the release] shall be deducted from any award...." 390 U.S. at 518, 88 S. Ct. at 1152. Again, this policy is fair only if the employee who signed the release suffered an actual injury, as was the case in *Hogue*; however, prospective releases, as opposed to settlements, are premised on the contrary notion. The majority of employees will receive benefits despite suffering no injury, and since these benefits exceed the value of their ADEA suits, deducting money from a recovery that does not occur is no consolation. Moreover, *Hogue's* statement that "it suffices that ... the sum paid shall be deducted from any award determined to be due to the injured employee" is not a legal conclusion or an attempt by the Court at a compromise result, but is instead mandated by the specific language of section 5 of FELA. *Id.* at 517 n. 5 ("in any action brought against any such common carrier under ... this chapter, such common carrier may set off therein any sum it has contributed or paid ... to the injured employee ... on account of the injury or death for which said action was brought.") There is no guarantee that this "*Hogue* setoff" will be applied in other areas. In *Soliman*, the district court stated, without deciding the outcome, only that "[defendant] is entitled to a determination of what portion, *if any*, of the benefits ... should be deducted from whatever award [plaintiff] receives." 869 F. Supp. at 70 (emphasis added).

Of course, where there is a legitimate claim of age discrimination, the calculus differs. But an employee who

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increase the value of the offered benefits significantly.

is terminated discriminatorily is no more or less able to tender back the consideration than a legitimately discharged employee. Again, the contrast with *Hogue* and FELA is clear: an employee in Hogue's position does have additional costs that result from the fact of his injury. Since the circumstances that gives rise to a FELA claim (physical injury, medical expenses, etc.) also create economic duress, applying the tender-back rule would be a hardship on the employee, so an exception is warranted. Thus, the doctrine would indeed "deter meritorious suits" in the *Hogue* situation, whereas applying the rule to prospective waivers would merely deter all suits, regardless of merit.

This circuit has endorsed the application of common law doctrines to waivers and releases. For instance, in *Shaheen* v. *B.F. Goodrich Co.*, 873 F.2d 105, 107 (6th Cir.1989), where we held that waiver of an employment discrimination claim was not void as against public policy,[8/] we also noted that a court should examine waivers and releases "under normal contract principles," in the absence of overreaching or exploitation.

I would hold that a tender-back requirement is not barred by *Hogue*, and is instead consonant with basic

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[8/] We stated that "public policy weighs in favor of allowing voluntary settlement of Title VII disputes and releases of private rights under the ADEA." *Shaheen*, 873 F.2d at 107. I find nothing to the contrary in the amendments to the OWBPA. In cases where there has been no discrimination and hence no "dispute," the worker receives a windfall, while the employer is purchasing certainty and finality, a valuable business and legal commodity.

notions of fairness in contract law.[2/] The OWBPA, while it specifically changed the common law rules regarding the adequacy of knowledge and consent for making a valid waiver, did not purport to affect the preexisting contract law concerning the effect of invalid waivers. In such a circumstance, with neither the statutory language nor legislative history indicating any desire to change that ancient and reasonable body of law, I would hold that the tender-back rule continues to obtain. However, because of the confusion in the state of the law, as evidenced by the conflicting rulings in this area, I would hold that plaintiffs should not be deemed to have affirmatively ratified their waiver by failing to return their compensation. Instead, now having full knowledge of the consequences, plaintiffs would be able to continue with their suits only if they return the compensation received for the very thing, the waiver, that they now claim was worthless.

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[2/] In a case upholding the validity of a similar ADEA waiver (but pre-OWBPA), we noted:

> To set aside [plaintiff's] waiver in this case, after he had received enhanced benefits, may seem both inequitable and unfair. [He] is currently receiving additional benefits under the severance package, yet seeks to gain additional benefits of reemployment. If [he] were deemed entitled to be considered for reemployment, [defendant] might thereby be denied the benefit of its bargain. Some adjustment might therefore be appropriate in such a circumstance, if [plaintiff] were ultimately found entitled to reinstatement or to damages.

*Adams* v. *Philip Morris, Inc.*, 67 F.3d 580, 585 (6th Cir. 1995).

## IV

The judgment of the district court is therefore reversed and the case remanded with instructions to proceed in conformity with parts I and II of this opinion and with the judgment of the court.

NATHANIEL R. JONES, Circuit Judge, concurring in part. I agree with Parts I and II of the Judge Boggs' opinion, but I disagree regarding the tender-back requirement in Part III. Under the circumstances in this case, I do not believe Plaintiffs are required to tender back the consideration they received as a precondition to bringing suit against the Defendants under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, as amended by the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626 *et seq.* The judgment of the district court on this issue will be affirmed.

The application of the "tender-back" doctrine in ADEA cases has created a split between the circuits. The Fourth and Fifth Circuits have applied the tender-back doctrine requiring plaintiffs to tender-back the consideration received before filing suit, while the Seventh and Eleventh Circuits have rejected a tender-back requirement. Compare *O'Shea* v. *Commercial Credit Corp.*, 930 F.2d 358 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991), and *Wittorf* v. *Shell Oil* 37 F.3d 1151 (5th Cir. 1994), with *Forbus* v. *Sears Roebuck & Company*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 506 U.S. 955 (1992), and *Oberg* v. *Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir.1993), cert. denied, 114 S.Ct. 2104 (1994). Judge Boggs' opinion, following the Fourth and Fifth Circuits,

finds that "continued retention of the enhanced compensation precludes filing suit, pursuant to federal common law and general principles of contract law and equity . . . . Boggs Op. at 5. Judge Boggs believes that if Plaintiffs retain compensation benefits, given pursuant to a severance agreement, they are precluded from filing suit under the ADEA. I disagree with this conclusion. Nor do I believe that the Plaintiffs ratified their severance agreements by continued retention of their benefits. I find the reasoning of the Seventh and Eleventh Circuits more persuasive and disagree with the proposition that Plaintiffs are required to tender back the compensation they have received.

In *Forbus* v. *Sears Roebuck & Company*, 958 F.2d 1036 (11th Cir.), cert. denied, 506 U.S. 955 (1992), the Eleventh Circuit held that retirees who brought suit under the ADEA were not required to return the consideration received for releases as a prerequisite to bring suit. *Id.* at 1041. The facts in *Forbus* are similar to those in this case. The plaintiffs were employees at a Sears Retail Distribution Center. *Id.* at 1038. Sears informed the plaintiffs that the distribution center would be converting into a smaller retail center and would be reducing the number of jobs available. *Id.* The plaintiffs were offered a voluntary severance package, which they each accepted. *Id.* Acceptance of the package required the signing of a release and waiver of any claims against Sears. *Id.* The court held that the retention of the severance benefits did not constitute ratification of the releases. *Id.* at 1041. In *Oberg* v. *Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 2104 (1994), the Seventh Circuit followed the reasoning in *Forbus* and held that

former employees could not ratify their severance agreements by retaining the benefits received from Allied. *Id.* at 683. On similar facts, the court found the reasoning in *Forbus* compelling and rejected a tender-back requirement.

Both *Forbus* and *Oberg* rejected the notion that Plaintiffs must tender back severance benefits prior to maintaining a suit under the ADEA. Both circuits relied heavily on the Supreme Court decision in *Hogue* v. *Southern Ry.*, 390 U.S. 516 (1968). While *Hogue* did not involve ADEA claims, it is clearly analogous to the ADEA situation.

At issue in *Hogue* was whether petitioner was required to tender back payments received prior to the bringing of suit under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq. Id.* at 518. Holding that no such requirement existed, the Court argued that to require the return of benefits would be "wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers." *Id.* (quoting *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, 362 (1952)).

Other courts have applied *Hogue* to bar tender prerequisites in lawsuits involving federal statutes other than the FELA. *See, e.g., Smith* v. *Pinell*, 597 F.2d 994, 996 (5th Cir. 1979) (barring a tender requirement pursuant to the Jones Act); *Wahsner* v. *American Motors Sales Corp.*, 597 F. Supp. 991, 998 (E.D. Pa. 1984) (holding that there is no tender-back requirement in a case involving the Automobile Dealers' Day in Court Act). These cases show

that the application of the *Hogue* decision is not limited to the FELA context, and its denial of the tender-back requirement can legitimately be extended to other remedial statutes. The *Hogue* decision is the only time the Supreme Court has spoken on the issue of tender-back prerequisites and should be followed by this court.

*Hogue* may be extended logically to ADEA claims. Both statutes are designed to make employees whole again from injuries received, whether physical or emotional, during the course of employment. I disagree with Judge Boggs' reasoning that *Hogue* is inapplicable to the instant case because under the facts of Hogue the injury was not in doubt. Boggs Op. at 24. Judge Boggs precludes applying *Hogue* in the present case because the injury was not clearly established. The fact that injury is not clearly established, as is the case under the FELA, is not reason enough to hold that *Hogue* is not analogous. There is no doubt but that the *Hogue* decision is applicable to the instant case. Accordingly, Plaintiffs should not be barred from suit by a tender-back requirement. The consideration Plaintiffs received is not a bar to suit but should instead be considered as an affirmative defense once a suit is filed. *Isaacs* v. *Caterpillar, Inc.*, 765 F. Supp. 1359, 1371 (C.D. Ill. 1991). Defendants have a right to argue that the signing of the release agreement bars plaintiffs' claim of age discrimination, but this is something that should be argued once suit is brought.

Further, to require Plaintiffs to tender back benefits would be inequitable. A tender-back requirement would deter meritorious ADEA filings. Potential Plaintiffs would be faced with the Hobsonian choice of releasing their claims and receiving payments immediately or filing an

age discrimination claim that would likely take years to resolve. It is doubtful that few claimants would choose the latter. If Plaintiffs had already received release consideration they would have to recover any amounts spent before they could bring a claim.

This would bar Plaintiffs from litigating their age discrimination claims in court. Rather than a bar to suit, a release should be considered as a factor that would reduce the judgment amount received by a plaintiff upon bringing suit. I find the reasoning of the district court compelling:

> It would be inequitable and contrary to the protective nature of the OWBPA to require plaintiffs to tender back the consideration received in exchange for executing waivers where the waivers were obtained without compliance with the OWBPA. Furthermore, it would deter meritorious challenges to releases. Workers who are forced out in an involuntary termination "are unlikely to be able to put their severance payments aside for future 'tenders' or to be able to come up with the money to make such a tender at such later time as they acquire grounds to believe that a successful lawsuit might be mounted in connection with their retirements."

*Memorandum and Order of Aug. 1, 1994* at *21* (quoting *Isaacs* v. *Caterpillar, Inc.*, 765 F. Supp. 1359, 1367 (C.D. Ill. 1991)).

Requiring that release amounts be subtracted from judgment amounts would be a more equitable remedy than forcing potential claimants to tender back benefits prior to bringing suit. Plaintiffs would not be earning a windfall by

being able to retain their benefits and receive a judgment amount as well, and employers would not be penalized twice for the same actions because any money already received could be subtracted by the fact-finder before awarding final damages.

Additionally, a tender-back requirement would contradict the concerns that Congress evidenced in enacting the OWBPA. Congress established the OWBPA because of its concern that employees may waive their rights prior to becoming aware that they are entitled to legal and equitable relief.

> The Committee's [Committee on Education and Labor] major concern in this regard is that early retirees or employees ... can be forced to waive their right to file a claim when the employer conditions such participation on the signing of a waiver.... The preemptive waiver of rights occurs before a dispute has arisen and indeed before an employee is even aware of any potential or actual pattern of discrimination. Such a preemptive waiver also may preclude the employee from asserting claims that arise out of subsequent discriminatory conduct by the employer, e.g., hiring younger workers to replace the terminated older workers. These waivers are both unfair and inconsistent with the intent of the ADEA.

H. Rep. No. 101-664, 101st Cong., 2d Sess. 22-23. It was the intent of Congress that waivers would not preclude

parties from bringing suit under the OWBPA. To require a tender-back requirement is an effective bar to suit and as such, it is incongruous with the intent of the OWBPA.

For the forgoing reasons, the judgment of the district court will be affirmed on this issue.

GUY, Circuit Judge, concurring in part and dissenting in part. I concur with Parts I and II of Judge Boggs's opinion, but I concur in the result only reached by Judge Jones on the tender-back issue discussed in Part III of Judge Boggs's opinion, limiting my concurrence to the facts of this case.

On the tender-back issue, I would only add that there was not a total failure of consideration when the ADEA claim was instituted without plaintiffs tendering back benefits received. The release signed was a general one, releasing the employer from any and all claims, not just ADEA claims. The general release is still valid, and it is only that portion of the release involving ADEA claims that is called into question by this lawsuit. I reserve judgment as to whether a release limited to ADEA claims would require a different result.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-1082

GARY RACZAK, et al.,

Plaintiffs-Appellees,

v.

AMERITECH CORPORATION, et al.,

Defendants-Appellants.

Before: JONES, GUY and BOGGS, Circuit Judges.

March 21, 1997

**ORDER**

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

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Leonard Green, Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

**Gary Raczak, Carole Chandler, Bernard Surma, Thomas Satkiewicz, Loraine Holmes, Gladys Moore, Jean Kruse, Phyliss Tarpley, Lou Ann Fox and Dorothy Payne, Plaintiffs,**

*v.*

**Ameritech Corporation, Ameritech Services, Inc. and Michigan Bell Telephone Company, Defendants.**

Civ. A. No. 93-72697.

August 1, 1994.

MEMORANDUM AND ORDER

COHN, District Judge.

## I. Introduction

This is an age discrimination case under the Age Discrimination in Employment Act (ADEA). 29 U.S.C. § 621 *et seq.* Plaintiffs Carole A. Chandler (Chandler), Lou Ann Fox (Fox), M. Jean Kruse (Kruse), Thomas Satkiewicz (Satkiewicz), and Phyllis J. Tarpley (Tarpley) were employed by defendant Ameritech Services, Inc. (Ameritech Services). Plaintiff Gary Raczak (Raczak), Bernard Surma (Surma), Loraine Holmes (Holmes), and Gladys Moore (Moore) were employed by defendant Michigan Bell Telephone Company (Michigan Bell). All of the plaintiffs allege that they were selected to be terminated under Ameritech Services' and Michigan Bell's

Workforce Resizing Programs solely on the basis of their age. They claim age discrimination under the ADEA.[1/] Ameritech Services and Michigan Bell filed a counterclaim for breach of contract against all of the plaintiffs claiming they breached the terms of an agreement, styled "Termination Agreement, Waiver, and Release" (the "Waiver") by filing the instant action.

Now before the Court is Ameritech Services's motion for summary judgment and Michigan Bell's motion for summary judgment. Also before the Court is plaintiffs' cross motion for partial summary judgment.[2/] For the reasons which follow, Ameritech Services's motion will be denied, Michigan Bell's motion will be denied, and plaintiffs' motion will be granted.

## II. Facts

### A. Ameritech Plaintiffs

In September 1992 Ameritech Services announced the institution of a Workforce Resizing Program (the program) affecting all of it management employees. The program had two components, voluntary and involuntary.

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1/ In their initial complaint plaintiffs alleged defamation and libel against both Ameritech and Michigan Bell based on comments made by a Michigan Bell spokesperson in an article appearing in the Detroit Free Press. Plaintiffs have since withdrawn that claim.

2/ The Court does not understand why plaintiffs consider their motion a motion for partial summary judgment as it merely is a cross motion to Ameritech Service's motion and Michigan Bell's motion for summary judgment.

All management employees were eligible for the voluntary component and could elect to participate in it until November 2, 1992 although their actual termination date could be postponed until after the involuntary terminations were scheduled to take place. Ameritech Services began identifying individuals for involuntary separation. It first looked at each eligible employee's incentive compensation payments and bonuses in each salary grade for the years 1990 and 1991.[3/] The lowest thirty percent in each salary grade were designated as the "at-risk pool". The at-risk pools were then subjected to ranking sessions in which all of the employees in each at risk pool were ranked against one another based on certain management skill criteria including job performance, job skills, experience, team orientation and demonstrated leadership skills. The rankers were also allowed to consider recent classification changes as a factor if appropriate under the circumstances. After the ranking sessions were completed, Ameritech Services' vice presidents determined the number of people to terminate based upon the company's overall objectives. The decisions were later approved by the Vice President of Human Resources and the President of the Company. All of the people in the at risk pool were ranked regardless of

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[3/] Excluded from the process were employees hired or promoted from non-management to management in 1989 or later; employees promoted from one salary grade level to another in 1990 or 1991; employees hired into the Ameritech Development Program in 1989 or later; employees hired into the Initial Management Development Program in 1988 or later; non-management employees placed on temporary promotion in 1991 or 1992 and employees hired as a result of co-op arrangements, scholarships or special programs.

whether they chose to take advantage of the available voluntary options.

The involuntary termination selection process took place in September and October 1992, although employees were not officially notified of termination until November 10, 1992. Those who were to be involuntarily terminated had the option of taking a voluntary retirement or termination if they elected to do so before November 10, 1992. Although the involuntary terminations were not to be announced until November 10, 1992, managers were encouraged to be candid in answering employee's questions and to tell employees whether they had been discussed in the ranking sessions, although the managers were not to divulge an employee's actual rank. All of the Ameritech plaintiffs were in the at risk pool and were ranked. All of them were involuntarily terminated. At the time they were notified of their termination, Ameritech Services gave the Ameritech plaintiffs a packet of information which included information about supplemental benefits that were available provided the employees sign a waiver styled "Termination Agreement, Waiver and Release". The Ameritech plaintiffs were informed in paragraph seven of the waiver that they had sixty days within which to execute the waiver and, if they accepted, they had seven days within which to revoke their acceptance. They were also advised at the top of page one of the waiver to consult with an attorney before executing the waiver. Additionally, the Ameritech employees were given a chart which listed, for each age and salary grade, the number of employees "selected" and "not selected" for involuntary termination. All of the Ameritech employees executed the waivers and, in turn, received compensation

ranging from $22,275.05 to $72,690.27. None of the plaintiffs revoked their release.

The Release provides in Paragraphs 4 and 5, in relevant part:

> (4) For and in consideration of the special benefits and enhancements paid to me and described herein under the 1992-1993 Workforce Resizing Program (the Program), I for myself ... do hereby fully and forever release, acquit, and discharge and covenant not to sue the Company, its parent, ... of and from any and all demands, actions, causes of action, suits, debts, charges, complaints, claims (except claims for benefits brought pursuant to and in accordance with the various claim and appeal procedures in the Employee Benefit Plans affected by the Program), liabilities, obligations, promises, agreements, controversies, damages, and expenses (including attorney's fees and cost actually incurred) of any nature whatsoever, in law or equity, from the beginning of time up to the date of execution of the Agreement and which relate to my employment with the Company or my separation from employment, including, but not limited to, all claims based on tort, contract, and any claim arising from an alleged violation by the Company of any federal, state, or local statutes, ordinances, regulations, Executive Orders, or common law, including but not

limited to, the Age Discrimination in Employment Act of 1967, as amended, the Employment Retirement Income Security Act of 1974, as amended, Title VII of the 1964 Civil Rights Acts, as amended, the Equal Pay Act of 1963, as amended, the Civil Rights Act of 1866 as amended, the employment discrimination laws of the state of employment, the Americans with Disability Act, the Worker Adjustment Retraining and Notification Act, or any claim based on alleged discrimination, breach of contract, or public policy, wrongful or retaliatory discharge or any opportunity to participate in the selection review process established as part of the Program, and all claims to salary, salary continuation, bonus, vacation, incentive awards, insurance, benefits and/or compensation except as specifically enumerated in the Program.

(5) Except as necessary for me to enforce the Program, this Agreement is intended by me and the Company to be a general release and a covenant not to sue which extinguishes all claims and precludes any attempt by me to initiate any litigation against the Company or the Ameritech entities regarding any matter, incident, or thing which occurred up to the date of this Agreement.

**B. Michigan Bell Plaintiffs**

The Michigan Bell Workforce Resizing Program was identical to Ameritech Service's Program in content and application. Michigan Bell plaintiffs Surma, Holmes, and Moore were involuntarily terminated. Raczak opted for an early retirement. Surma, Holmes and Moore executed a Termination Agreement, Waiver and Release, identical to the Ameritech waiver, and in exchange received additional compensation. Surma, Holmes and Moore were given a chart similar to the chart given the Ameritech plaintiffs, which, for each age and salary grade, listed the number of employees "selected" and not "selected" for involuntary termination.

Raczak executed a "Waiver and Release" dated and notarized November 9, 1992 which provides in relevant part:

> For and in consideration of the special benefits and enhancements paid to me and described under the 1992-1993 Workforce Resizing Program, I ... do hereby fully and forever release, acquit, and discharge and covenant not to sue my employing company ... of and from any and all demands, actions, causes of action, suits, debts, charges, complaints, claims (except claims for benefits brought pursuant to and in accordance with the various claim and appeal procedures, agreements, controversies, damages and expenses (including attorney's fees and costs actually incurred) of any nature whatsoever in law or

equity, from the beginning of time up to the date of execution of the Agreement and which relate to my employment with the Company or my separation from employment, including, but not limited to, all claims based on tort, contract, and any claim arising from an alleged violation by the Company of any federal, state, or local statutes, ordinances, regulations, Executive Orders, or common law, including but not limited to, the Age Discrimination in Employment Act of 1967, as amended, the Employment Retirement Income Security Act of 1974, as amended, Title VII of the 1964 Civil Rights Acts, as amended, the Equal Pay Act of 1963, as amended, the Civil Rights Act of 1866 as amended, the employment discrimination laws of the state of employment, the Americans with Disability Act, the Worker Adjustment Retraining and Notification Act, or any claim based on alleged discrimination, breach of contract, or public policy, wrongful or retaliatory discharge or any opportunity to participate in the selection review process established in the selection review process established as part of the Program, and all claims to salary, salary continuation, bonus, vacation, incentive awards, insurance, benefits and/or compensation except as specifically enumerated in the Program.

> Except as necessary for me to enforce the Program, this Agreement is intended by me and the Company to be a general release and a covenant not to sue which extinguishes all claims and precludes any attempt by me to initiate any litigation against the Company or the Ameritech entities regarding my matter, incident, or thing which occurred up to the date of this Agreement.
>
> * * *
>
> I represent and acknowledge that before signing this agreement I have read the same, the Program description ... and have been advised that all management employees irrespective of salary grade and age (except "Senior Managers") are eligible to participate in the Program ...

Raczak was also advised to consult with an attorney. He was given forty five days within which to execute the waiver, and if executed, seven days within which to revoke his acceptance. He was not given the chart regarding salary level and ages prior to executing the waiver.

Although the waiver Raczak signed is dated "November 9, 1992" and notarized "November 9, 1992", Raczak says he actually signed it on November 10, 1992, backdated it, and had the notary backdate it as well because he believed that the waiver had to be executed on November 9, 1992. On November 17, 1992 Raczak executed a revocation of the waiver.

The Ameritech plaintiffs and the Michigan Bell plaintiffs then brought this action June 28, 1993 alleging that the plaintiffs were selected for termination on the basis of their age.

## III. Law and Analysis

In 1990 Congress amended the ADEA, setting forth the following requirements for a knowing and voluntary waiver of rights under the ADEA, 19 U.S.C. § 626[4/].

> (f)(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--
>
> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under this chapter;
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

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4/ The amendment is also known as the Older Worker's Benefit Protection Act (OWBPA).

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement;

(F)(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in paragraph (F)) informs the individual in writing in a manner calculated

> to be understood by the average individual eligible to participate, as to--
>
> (i) any class, unit or group of individuals covered by such programs, any eligibility factors for such program, and any time limits applicable to such program, and
>
> (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.
>
> * * *
>
> (3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1) ... have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

Plaintiffs acknowledge that all but one of the requirements of 29 U.S.C. § 626 were met by both Ameritech Services and Michigan Bell. The dispute is over the requirement of subsection (H)(ii)--whether Ameritech Services' and Michigan Bell's use of salary grade levels, in lieu of job title, job classification and organizational unit, is sufficient to comply with the statute;

and whether those employees who chose to voluntarily terminate should have been categorized differently. Ameritech Services and Michigan Bell, pursuant to 29 U.S.C. § 626(3), have the burden of establishing compliance with the statute and establishing that the waiver was knowing and voluntary.

### A. Categorization of Selected and Not Selected[5/]

1.

Ameritech Services and Michigan Bell listed those employees that accepted voluntary termination under the category "not selected" and "retained" respectively. The Ameritech Services and Michigan Bell plaintiffs contend that by including those who took voluntary retirement in the "not selected" or "retained" category, it made it appear that more older workers were remaining as more older workers opted to retire early or terminate voluntarily. Further, the Ameritech Services and Michigan Bell plaintiffs note that the "not selected" and "retained" categories also included those employees that chose to be demoted and keep their job. What the statute requires, plaintiffs argue, is a listing of those adversely affected by the workforce reduction and those not adversely affected.

In response, Ameritech Services says that if it took those employees that voluntarily terminated out of the "not selected" category, the total of the two groups, "selected"

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5/ Ameritech Services referred to those employees that were involuntarily terminated as "selected" and those that remained or voluntarily terminated as "not selected". Michigan Bell used the terms "selected" and "retained".

and "not selected", would not equal all of those eligible for involuntary termination. Ameritech Services notes that the voluntary phase was in effect while the involuntary termination decisions were being made and that those who opted for voluntary termination had the ability to change their mind after the involuntary termination selections were made and could then be reinstated. Ameritech Services says it would have been impossible to extrapolate those choosing voluntary termination out of those who were "not selected". Further, Ameritech Services notes that it needed a certain amount of terminations. If it did not get enough voluntary terminations, more employees would be involuntarily terminated. Therefore, the "not selected" category included all employees not selected for involuntary termination who could have been terminated involuntarily if those employees choosing to take voluntary termination later changed their mind and stayed. Additionally, Ameritech Services contends that the statute only requires that it inform those selected for involuntary termination of the ages and classifications of those actually terminated and those not terminated. There is no requirement that it create a category for those adversely effected.

Michigan Bell, in its reply, adds that the statute requires that the information provided to the employee be sufficient to be understood by the average individual eligible to participate. Michigan Bell says that it is not required to give plaintiffs additional information that plaintiffs think will be helpful as plaintiffs suggest.

2.

Ameritech Services' and Michigan Bell's system for classifying those selected and not selected or retained complied with the requirements of 29 U.S.C. § 626(H)(ii). The statute requires that Ameritech Services and Michigan Bell provide information as to those selected for termination in a manner calculated to be understood by the average individual eligible to participate. They complied with this requirement by including in the "selected" category, only those who actually were selected for termination. Additionally, in Michigan Bell's newsletter, "Tie Lines Update" and Ameritech Service's newsletter, the "Bulletin", the term "selected" was used when referring to those subject to involuntary termination. Thus, the term "selected" was already a familiar term with a distinct meaning to the employees. Further, the inclusion of those demoted or those electing voluntary termination in the categories of "not selected" or "retained" was not misleading. Those employees that were demoted and those employees that chose to voluntarily terminate were not selected for involuntarily termination. Ameritech Services and Michigan Bell were not required to go any further than they did and impart who was "adversely affected" by the workforce reduction program.

**B. Job Title Versus Salary Grade**

1.

Plaintiffs next contend that Ameritech Services' and Michigan Bell's use of salary grade in lieu of job title fails to comply with the requirements of the statute. Plaintiffs say that salary grade provides no description of an employee's job function or duties. Further, plaintiffs

contend that salary grade is not sufficient to allow the average employee to assess whether the program implemented discriminated on the basis of age.

Ameritech Services responds that charting employees by salary grade made more sense and provided clearer information to its employees than charting by job title given the organizational structure and given the manner in which the program was effectuated. Ameritech Services notes that the Workforce Reduction Program applied only to managers and that its managers are classified by salary grade. Further, Ameritech Services says that it made the termination decisions by salary grade. Ameritech argues that its managers were familiar with the fact that the hierarchy was defined by salary grade therefore, it gave the employees information regarding salary grade, not job title, so that the average individual eligible to participate in the program would understand the information. Finally, Ameritech Services says that it believed that the terms "job title", "job classification" and "organizational unit" were synonymous and interchangeable.

Michigan Bell adds that it had twelve salary grades in its management program. It reiterates that its Workforce Reduction Program was implemented by salary level. Therefore, it says that using job titles would not have provided the employees with the information used in evaluating the management employees.

**2.**

The statutory language requires an employer to provide the job titles of all those eligible to participate in the program.

In interpreting statutory language, Chief Justice Marshall explained:

> It is true that the natural import of words may be affected by the context, and that where other parts of the statute demonstrate an intent different from that which the words of a particular section of themselves would import, such manifest intent may be admitted, to give to the words employed a less obvious meaning. But, in this statute, no such intent appears.

*Oneale* v. *Thornton*, 10 U.S. 53, 57, 6 Cranch 52, 66 (1810). There is nothing in this statute which demonstrates that Congress intended that job title need not be given to employees or that salary grade is equivalent to job title. "Men [and women] use a language calculated to express the idea they mean to convey." *Id.* If Congress had meant to allow employers to give information regarding salary grade in lieu of job title it would have so stated. Instead, the Court must presume Congress chose the term job title with particularity. Further, the terms job title and salary grade are not synonymous. Salary grade merely imparts how much a particular employee is paid in a standardized salary scale. It provides no information as to what job that employee holds or the duties of that job. [6/]The United

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[6/] The Dictionary of Occupational Titles, compiled by the United States Department of Labor--Employment and Training Administration, a standardized list of job titles, confirms the distinctions. For example, the section "Occupational Titles Arranged by Industry Designation" gives four different "Manager" titles for the Telephone and Telegraph industry

States District Court for the Southern District of Indiana was faced with the identical issue in *Adams* v. *Indiana Bell Telephone Company, Inc.*, IP 93 420 C (S.D. Indiana, May 18, 1994) and in *Allard* v. *Indiana Bell Telephone Company, Inc.*, IP 93 1346 C (S.D. Indiana, May 18, 1994). There the plaintiffs challenged Indiana Bell's and Ameritech Services' use of salary grade instead of job title. The district court[7/] held that Indiana Bell and Ameritech's use of salary grade was insufficient and did not comply with the terms of the statute. The district court found that the terms "job title", "job classification", "organizational unit" and "salary grade" were not synonymous and that salary grade was not equivalent to job title. The district court looked to the method by which a plaintiff must prove age discrimination in a workforce reduction situation and stated:

> In an ADEA case, a plaintiff may create a rebuttable presumption of age discrimination by establishing the following four elements: (1) that the plaintiff was in the protected age group; (2) that the plaintiff met the legitimate performance expectations; (3) that the plaintiff was discharged; and (4) that a replacement was sought, or one was found, outside of the protected class. [citations omitted] If a termination is part of a

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designation. U.S. Dep't of Labor, Dictionary of Occupational Titles, p. 1196 (Fourth Ed. 1991).

7/ Both cases were decided by the same judge.

reduction in force, establishing the fourth element is problematic because when an employer terminates employees in connection with a downsizing a terminated employee's duties are usually reallocated to other employees and the plaintiffs position is not filled by anyone, let alone someone outside the protected class. [citations omitted] Therefore, a protected employee terminated under a reduction in force program is usually required to present evidence indicating that he or she was terminated as part of "a pattern of downsizing that could ultimately benefit a person not a member of the protected class. [citations omitted]. One way to evaluate whether such a pattern exists is to look at the job titles and ages of all terminated employees and then compare that information with the ages of nonselected employees who perform similar or related work and are thus likely to take over the terminated employees' duties or perform jobs that the plaintiff is likely to be qualified to perform (*i.e.*, employees of the same job classification or organizational unit as the selected employees. If that information reveals that the employees selected for termination were consistently older employees within the selected employee's job classification or organizational unit, one might suspect that the employer engaged in age discrimination

> To make a similar evaluation under circumstances where the employer provides only the ages and salary grades of the selected and nonselected employees requires an assumption that employees within the same salary grade perform the same or related work. Such an assumption is not warranted. And, under a literal interpretation of the statutory language, such an assumption is not allowed. An employee's salary grade is simply neither the employee's "job title" nor the employee's "job classification" or "organizational unit".

*Allard*, *supra* at 12-14. The analysis in *Allard* is persuasive. Notwithstanding the fact that the termination decisions were made using salary grade, based on the information in the charts given to the employees, there is no way to distinguish whether all those at a given salary grade performed similar or different functions. Although the employees of Ameritech Services and Michigan Bell may have been familiar with an hierarchy divided into salary grades, a salary grade classification does not give the information relevant to determining whether someone performing a specific job function was replaced with a younger person or whether older employees were targeted for termination.

Because the waivers executed by both the Ameritech Services employees and the Michigan Bell employees did not comply with 29 U.S.C. § 626(h)(ii), the waivers were not knowing and voluntary. Therefore, the

waivers do not bar plaintiffs from bringing an action under the ADEA.

### C. Raczak's Claim

Raczak claims that his waiver was not knowing and voluntary because he did not receive the age and salary grade information prior to executing the Waiver and Release. Even if his waiver was knowing and voluntary, Raczak says he effectively revoked the waiver within the seven day time period.

#### 1.

Michigan Bell admits that Raczak did not receive the salary grade and age information. However, they contend that they were not required to provide that information to him because he chose to voluntarily retire. Michigan Bell says that the statute requires them to give that information only to those employees that are involuntarily terminated.

Neither party provides any support for their interpretation of the statute nor is the Court aware of any case discussing this issue. The statute requires that where an employer requests a waiver in connection with an "exit incentive or other employment termination program offered to a group or class of employees" then the age and job title information must be provided. It does not, on its face, limit the requirement to an involuntary termination program. Here, Raczak was asked to sign a waiver in connection with a program designed to entice management employees into taking early retirements or voluntarily terminating employment. Clearly, this constitutes an "exit incentive program" which was offered to a group of

employees. Accordingly, Michigan Bell should have provided Raczak with the job title and age information. Its failure to provide that information makes his waiver involuntary or unknowing.

2.

Raczak also claims that he effectively revoked his waiver. He admits that he actually signed the waiver on November 10, 1992. However, he says that he dated the waiver November 9, 1992 and had the notary do the same because he thought the waiver had to be dated November 9, 1992 in order for him to be eligible to participate in the voluntary retirement program. He executed a Revocation of Waiver on November 17, 1992. If the Court finds that he signed the waiver on November 10, 1992 and disregards the date on the waiver, his revocation would be valid. However, the Court will not do so. Raczak backdated his waiver in order, he thought, to obtain the benefit of participating in the voluntary retirement program. Having obtained that benefit, Raczak now seeks to obtain the benefit of a November 10, 1992 signing date which would make his revocation valid. The Court will not allow Raczak to have it both ways. He made the representation that he signed the waiver on November 9, 1992 and convinced a notary to go along with him. He must now live with the consequences of that action. The revocation was not effective because it was executed one day after the seven day deadline. However, Raczak may still maintain his action as his waiver was involuntarily obtained due to the lack of age and job title information.

**D. Ratification**

Ameritech Services and Michigan Bell say that even if the waivers are found to be defective, the plaintiffs have ratified the waiver agreements because they accepted and retained the consideration given in exchange for the waivers. The Courts of Appeal are divided as to whether a party must give or tender back the consideration received for signing a waiver of ADEA rights before bringing an ADEA action. The Courts of Appeal for the Fourth and Fifth Circuit hold that a failure to return the consideration paid for the release results in ratification. See *O'Shea* v. *Commercial Credit Corp.*, 930 F.2d 358 (4th Cir. 1991); *Wamsley* v. *Champlain Refining and Chemical, Inc.*, 11 F.3d 534 (5th Cir. 1993); and *Grillett* v. *Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991). The Courts of Appeal for the Seventh Circuit and Eleventh Circuits hold otherwise. *Oberg* v. *Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *Forbus* v. *Sears Roebuck & Company*, 958 F.2d 1036 (11th Cir. 1992). The Court believes the Seventh and Eleventh Circuits' approach is better reasoned.

The question of whether a tender back of consideration is a prerequisite to bringing this action is determined by federal law. *Hogue* v. *Southern Railway Co.*, 390 U.S. 516 (1968). In *Hogue*, the Supreme Court rejected the tender requirement in Federal Employer's Liability Act (FELA) cases holding that a rule requiring tender would be incongruous with the general purposes of FELA and would deter meritorious challenges to releases in FELA cases. *Forbus*, 958 F.2d at 1040.

So too, would a tender requirement in an ADEA case be incongruous with the general purposes of the OWBPA. Congress was concerned that early retirees or employees being offered the chance to participate in exit incentive programs could effectively be forced to waive their right to file a claim when the employer conditions participation in the program on the execution of a waiver. H. Rep. 101-664, 101st Cong., 2d Sess. pp. 22-23 (1990). It was also concerned that such waivers could be executed in situations in which an employee would not reasonably be expected to know or suspect that age may have played a part in the employer's decision or that the program was designed to remove older workers from the work force. *Id.* Therefore, Congress enacted a set of strict requirements an employer must comply with in order for a waiver to be knowing, voluntary and valid.

It would be inequitable and contrary to the protective nature of the OWBPA to require plaintiffs to tender back the consideration received in exchange for executing waivers where the waivers were obtained without compliance with the OWBPA. Furthermore, it would deter meritorious challenges to releases. Workers who are forced out in an involuntary termination "are unlikely to be able to put their severance payments aside for future 'tenders' or to be able to come up with the money to make such a tender at such later time as they acquire grounds to believe that a successful lawsuit might be mounted in connection with their retirements." *Isaacs* v. *Caterpillar, Inc.*, 765 F. Supp. 1359, 1367 (C.D. Ill.1991).

Should plaintiffs ultimately be successful and recover, certainly any such recovery would be offset

against the benefits they've already received from Ameritech Services and Michigan Bell.

## IV.

For the reasons stated above, Ameritech Services' motion for summary judgment is DENIED. Michigan Bell's motion for summary judgment is DENIED. Plaintiff's Motion for Partial Summary Judgment is GRANTED.

SO ORDERED.

## STATUTE INVOLVED

Title II of the Older Workers Benefit Protection Act, an amendment to the Age Discrimination in Employment Act, is codified at 29 U.S.C. § 626(f) and states:

> (1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—
>
> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under this chapter;
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
>
> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
>
> (F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an

action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.